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In the Supreme Court of the United States

OCTOBER TERM, 1998

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, ET AL., *Petitioners,*

v.

PRINCE GEORGE CENTER, INC., ET AL., *Respondents.*

On Petition For A Writ Of Certiorari To The Superior Court Of Pennsylvania

REPLY BRIEF FOR PETITIONERS

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STATEMENT PURSUANT TO RULE 29.6

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REPLY BRIEF FOR PETITIONERS

Respondents do not contest the factual foundation for our constitutional challenges to the adequacy of representation and notice.[1/] They do not dispute that class counsel failed to make any inquiry into the existence or value of the claims being pursued by class members before consenting to extinguish them. They also do not deny that no effort was made to send notice to the addresses at which the notice was most likely "actually to inform the absentee" class members (*Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)) of the threatened disposition of their claims. Nor do respondents deny that the constitutional issues are broadly important.

Instead, they argue that (1) evaluation of the notice procedures would entail review of a factual finding by the Pennsylvania courts that Prudential received "actual" notice at corporate outposts; (2) the Pennsylvania courts' failure to reach the adequacy-of-representation issue insulates it from review; and (3) Prudential's failure "to protect itself" from class counsel's inadequate representation and notice by monitoring the case poses some sort of equitable bar to review. None of these assertions has merit or undermines the reasons for granting certiorari.

1. The Issues Raised Are Important And Recurring. The constitutional issues presented here are of great moment. In the last few years, Congress, lower federal courts and this Court have focused on the procedural vagaries and abuses in state-court class actions. Congress perceives the current state of affairs as so unguided and unfair that it is actively considering *federalizing* all major state-court class actions by eliminating the complete-diversity requirement for removal to federal court. See 67 U.S.L.W. 2723 (June 8, 1999). The abuses framed by this case are emblematic. Although the company respondents assert that it would impinge on "principles of federalism" (Opp. 28) for this Court to clarify the governing constitutional standards, the failure to respond to the problems may force congressional intervention with an even more profound impact on the relative roles of federal and state courts.

[1/] Respondents U.S. Gypsum Co. *et al.* are the "company respondents" (their Brief in Opposition is "Opp."); respondents class plaintiffs are "class counsel" (their Brief in Opposition is "Counsel Opp.").

Respondents make virtually no effort to deny the recurring nature of the questions presented in Prudential's petition. Instead, they argue that this case is not the appropriate vehicle to resolve these issues, repeatedly quoting Prudential's earlier characterization of aspects of the case as "unique." Opp. 2; Counsel Opp. 3.[2/] While certain aspects of this case are indeed extreme — "unique" — these facts frame constitutional *issues* that are generic and endemic. Broadly, the notice issue examines what efforts must be undertaken to ensure that addresses on a class notice list are the addresses "most likely" to inform the addressees of the pendency of the action. As manifested in the facts here, this issue implicates two huge categories of class members: (1) corporations with easily locatable headquarters; and (2) class members who have already provided the trial court and class representatives with their actual, relevant "best address" at some earlier stage in that very proceeding. The duty of class counsel to make reasonable inquiry about the value of class members' claims before extinguishing them in a global settlement is of similarly wide import. It is implicated in almost every case (such as mass tort actions) involving a large number of potential claimants.[3/]

The company respondents point to the recent withdrawal of the opinion in *Epstein* v. *MCA, Inc.*, 126 F.3d 1235 (9th Cir. 1997), which held that due process invalidates a state-court settlement where class counsel failed to do an adequate job of evaluating class members' claims. This development, they say, eliminates the conflict described in the petition (Pet. 16). What they fail to note, however, is that the panel's decision to withdraw its earlier opinion rested solely upon the view that the original forum court had already sustained the adequacy

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[2/] The company respondents endeavor to characterize the facts of this case as unusual by distinguishing several of the notice cases we cited. Opp. 17-18. But that recitation merely shows that the Court's most important articulations of the due process requirements concerning individual notice have come in cases whose facts are, if anything, far more "unique" than those of this case. See *ibid.*

[3/] Class counsel contend (at 10-14) that, because Prudential only sought relief for itself in the trial court, this somehow suggests that the issues are not of general importance. Of course, anyone similarly situated — in this case and others — would be able to invoke the constitutional principles we urge the Court to define.

of representation and the issue was not (for divergent reasons) subject to *collateral* attack in a *different* forum. See 1999 WL 359511 (June 7, 1999). (Prudential, by contrast, is here pursuing a direct attack presented in the original forum.)

Neither judge in the *Epstein* majority purported to disavow the panel's earlier substantive holding that Delaware class counsel's failure to investigate the existence or pendency of class members' federal claims denied due process. Indeed, Judge Wiggins's concurrence indicated that he continued to endorse the original analysis of inadequacy, as Judge Thomas did explicitly in his dissent. See 1999 WL 359511, at *10 (Wiggins, J., concurring) ("I remain troubled by the substance of the Delaware settlement."); *id.* at *13 (Thomas, J., dissenting) (the "representation provided by Delaware class counsel was inadequate" because they "did not investigate or properly evaluate the federal claims"). As the D.C. Circuit once said in an identical situation, where another circuit's panel opinion had been withdrawn on jurisdictional grounds, "[i]f the song of [*Epstein*] has ended, the melody may linger on in * * * rulings and attitudes, guided by its wisdom though no longer channeled by its mandate." *Smith* v. *Katzenbach*, 351 F.2d 810 (D.C. Cir. 1965). Thus, the issue remains: Was the Ninth Circuit or the Pennsylvania court right about the standards required of class counsel under the due process clause?

2. The Notice Issue Is Properly Presented. Respondents' arguments in opposition to a grant of certiorari on the notice question are insubstantial. In our petition, we pointed out that neither class counsel nor the court made *any* effort to (1) update the notice list with the recent address information provided by the class members most likely to opt out of settlement (those who had opted out last time); (2) identify the "best address" (the corporate headquarters) of the many corporations in the class; or (3) verify the accuracy of the addresses of class members whose notices were returned as "undeliverable." Pet. 4-7, 25-29. We explained why that notice process was not designed in a manner "such as one desirous of actually informing the absentee [class member] might reasonably adopt" (*Mullane*, 339 U.S. at 315). We also explained why this Court should establish that due process requires constructing a notice process that addresses these recurring scenarios in a more careful way.

Respondents do not even attempt to argue that the notice process used in this case was the "best notice practicable" for the many class

members in Prudential's position. Instead, they attempt to side-step that constitutional question by arguing that review is improper since the Pennsylvania courts have "found as a factual matter that Prudential received actual notice" (Opp. 13). Thus, they aver, review would demand reconsideration of that factual finding by the state courts. This is a red herring. Prudential is not asking the Court to overturn any findings of fact or to make any new findings.

The state court's "actual" notice finding was simply that notices were "*delivered* to five separate Prudential properties" (Pet. App. 11a) (emphasis added). This inference rested on a state law "presumption" of *delivery*, because "the Post Office returned [only] two" of seven notices addressed to Prudential buildings. Pet. App. 28a, 11a, 15a. (During the years in question, Prudential owned approximately 1,000 buildings around the country.) There is no evidence, however, and thus no finding that anyone *employed by Prudential at those buildings* ever received the notices. Most crucially, it is undisputed that the process did not lead to anyone at Prudential's headquarters, including its counsel, learning of or receiving any of the mailed notices before the time to opt out or challenge the settlement had expired.

The goal of constitutionally adequate notice, however, is to ensure that the addressee is likely *to receive* the information in a way that will alert him to the proposed disposition of his property rights. *Mullane*, 339 U.S. at 315. Thus, the Court has emphasized that the "best practical notice" is notice that one "desirous of actually informing the absentee" would select. *Ibid.* Respondents do not question the well-settled notion (see Pet. 27) that one who actually desires to inform a corporation of the possible disposition of its legal claims, in a manner that would allow it time and opportunity to make an informed decision about how to proceed (see *Mullane*, 339 U.S. at 314-315), would direct notice to its headquarters. Nor do they debate the common-sense proposition that the best notice to any class member, individual or corporate, is notice to the address that class member has most recently provided to the court in that proceeding. (Thus, when the company respondents wanted Prudential actually to receive their "gotcha" notice the day after the time to challenge the settlement had expired, they sent it to Prudential's counsel.)

The constitutional question squarely presented here is whether due process requires class counsel and the court to use the easily accessible "best address" of corporate class members' headquarters,

especially where the class member has actually furnished that address in that very proceeding, rather than the address of some outlying corporate property. Whether or not the notice is "delivered" to some corporate employee, such as a janitor, at one of the outlying properties to which notice was directed does not affect the outcome of that question one way or the other. Put differently, if notice to those remote Prudential properties was not the "best notice practicable" to Prudential, because class counsel and the trial court "ha[d] on [their] books" (*Mullane*, 339 U.S. at 318) a more reliable address, then it makes no constitutional difference that the notices may have been "delivered" to *someone* at those properties.

Thus, references to Prudential's having received "actual" notice are a fiction sharply at odds with the controlling constitutional standard. It is mere question-begging to assert that Prudential had received "actual notice" and simply "failed" to act on it.

Ironically, respondents' only effort to justify as constitutional their decision not to bother using the easily accessible addresses Prudential (and other class members) had provided is to invoke the "flexibility" of the "best practicable notice" standard. Opp. 17. But this precisely frames our point. Flexibility is surely important in many situations. But when there are categories of class members for whom it is possible to define more concretely what the "best practicable notice" means—as this case illustrates—the Court should provide that guidance and close off a common opportunity for abuse.

Respondents further contend that, even if Prudential did not receive constitutionally sufficient notice of the settlement, the Court should deny certiorari because Prudential had a "duty to protect itself" by monitoring the action it knew was pending. Counsel Opp. 2. But as we explained in our petition, this argument — upon which each of the decisions below was premised — is irreconcilable with this Court's clear dictate. "Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection." *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 810 (1985). Similarly, Prudential's commercial sophistication and "ability to take steps" through legal advisors or otherwise "to safeguard its interests" (*Mennonite Bd. of Missions* v. *Adams*, 462 U.S. 791, 799 (1983)) "does not relieve" the

trial court of its "constitutional obligation" to provide sufficient notice. *Ibid.*

Class counsel trumpets Prudential's failure to send a contemplated letter trying to opt out of the entire case, suggesting this is some sort of equitable reason to deny review. Counsel Opp. 6-9. They do not establish, though, that the Pennsylvania court would have given effect to such a gratuitous letter. In any event, Prudential had "a right to assume that * * * 'reasonable notice'" of any new settlement would be given "before [its] claims are forever barred." *City of New York* v. *New York, N.H. & H.R. Co.*, 344 U.S. 293, 297 (1953).[4/]

3. The Adequacy-of-Class-Counsel Issue Is Properly Presented. ***A. Merits.*** Respondents raise no serious defenses to our challenge to the adequacy of the representation provided by class counsel. Although class counsel sharply criticize their "client," Prudential, for its purportedly "inexcusable" failure to protect its own interests, they *do not dispute* that they are guilty of an even more "gross misfeasance" (Counsel Opp. 3) — failing to protect the interests of not only Prudential, but any of their clients. Class counsel *do not dispute* that (1) they made *no attempt* to learn about the existence or determine the value of the claims that *any* class members were pursuing in other forums, before agreeing to extinguish those claims; (2) they never submitted an interrogatory to defendants inquiring about the existence of such pending claims; and (3) they lacked any knowledge of Prudential's lawsuit or the value of its asserted claim ($110 million) when they agreed to sell it for a pittance.[5/]

Indeed, none of the respondents even disputes that constitutionally adequate representation demands *some* meaningful investigation of

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[4/] To the extent class counsel suggest that Prudential's failure to send the letter somehow excuses their own failure to provide adequate representation, they are seriously misguided. It is common ground that counsel who purport to bind a client to a settlement may not excuse their failure to represent the client adequately by pointing out that the client had another attorney.

[5/] Ironically, the company respondents take issue with our calculation that the average claim was settled for $125, stressing (Opp. 8 n.8) that "settlements of this nature yield extremely low claim rates," so any class member who actually comes forward may get more!

the value of class members' claims before settling them. Instead of trying to justify the constitutional adequacy of class counsel's approach, respondents simply (1) point to the "experience" of class counsel and the frequency with which they engage in this sort of behavior (Opp. 3 & n.3, 24), and (2) argue that even the most minimal inquiry would have been excessively burdensome, given the sheer number of class members — "36,000+." (Opp. 23).

But both of these proffered "justifications" for class counsel's approach merely confirm the urgent need for this Court to grant review. If the "representation" afforded Prudential and other absent class members was, as respondents contend, the very best that class members can expect from the "leading" class action lawyers "in the nation" (Opp. 24), the problem is even more serious than we have contended. A class counsel's experience litigating similar types of claims is no substitute for learning the salient facts concerning major claims of identifiable "clients." In the context of individual representation, a similar reliance on familiarity with a kind of claim (*e.g.*, personal injuries) as a substitute for factual investigation of the value of the specific claim of one's clients (*i.e.*, the scope of the harm) would be fair ground for a malpractice suit. Respondents proffer no reason why such neglect of clients' interests is any more acceptable when the clients are involuntary members of a class.

When respondents suggest that the overwhelming size of a class excuses a failure to investigate, they confirm why review by this Court is imperative. In *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), the Court rejected exactly such a "the class is too big" excuse for curtailing the notice protections to which Rule 23 of the Federal Rules of Civil Procedure entitles absent class members. *Id.* at 175-176. The Court admonished: "There is nothing in Rule 23 to suggest" that its protections "can be tailored to fit the pocketbooks of particular plaintiffs" when they have chosen to represent a class of overwhelming size. *Id.* at 176. See also *Shutts*, 472 U.S. at 821 ("the fact that it may be more difficult or more burdensome to comply with constitutional limitations because of the large number" of class members does not excuse relaxation of those limitations). Similarly, class counsel's inability to provide adequately informed representation to a large class may require counsel to scale back their fee-driven desire to aggregate larger classes than they can fairly

represent. The size of the class they try to assemble cannot justify relaxing the applicable due process protections.

In a further effort to show the "infeasibility" of Prudential's due process test for the adequacy of class counsel, respondents mischaracterize our argument as demanding that counsel evaluate "the possible individual claims of each and every absent class member before negotiating a settlement." Opp. 22. Our point, rather, is that counsel made no reasonable or systematic inquiry into the value of the claims of the class *as a whole*, including those claims actually being pressed in other, identifiable pending lawsuits. Since class counsel here concededly made *no* inquiry into the claims of *any* of the class members, the question presented is whether *any* inquiry is required at all. The answer should be obvious. In any event, respondents do not dispute our point that class counsel could easily have garnered essential information regarding the claims *being actively pursued* by class members merely by serving a *single interrogatory* requesting that information. Pet. 19. The "burden" of that inquiry can hardly be characterized as exceeding the "reasonably diligent efforts" the Court has required in analogous contexts. *Mennonite Bd. of Missions*, 462 U.S. at 798 n.4.

Respondents also assert that the question is not amenable to review because Prudential purportedly failed to "present[] * * * evidence below that would support a finding that class counsel actually failed to perform adequately in its representation" of not only Prudential, but "the class as a whole." Opp. 23. But no "factual record" is necessary where, as here, the issue is not in dispute. Class counsel do not contest our assertion that they "did not ask defendants about, *or investigate independently, the existence or value of other pending lawsuits* that the settlement would extinguish." Pet. 5 (emphasis added).

Finally, the company respondents argue (at Opp. 4) that there was no need to investigate the value of the building owners' claims, because developing science suggested that they were of little value. But even the statistics they cite reporting their litigating experience (at Opp. 4 n.4) establish that juries have resolved between a third and a half of the cases in favor of building owners, like Prudential and its fellow class members, and against the company respondents. The record in the New Jersey case strongly suggested that Prudential's claims would be among the substantial percentage of suits against

asbestos-makers that succeed. It already had survived several motions to dismiss and was on the verge of trial. Further, as respondents note (Opp. 18), Prudential is a sophisticated company. If its claims were valueless, as respondents self-servingly suggest, it is inconceivable that Prudential would have devoted more than $15 million to pursuing them, as it has done.

Indeed, *both* sides were committing massive resources to the imminent trial. The company respondents continued to pour money into defending against Prudential's claims while they were negotiating to settle the class action. They evidently elected not to seek to stay those costly proceedings lest they tip off Prudential (and the federal court) that they were trying to buy their way out of the case for a song through a cozy settlement in a state-court class action. These tactics suggest an awareness of real exposure. In any event, the important point is not what the value of Prudential's claims was, but that (1) "highly experienced" class counsel deemed it constitutionally unnecessary even to evaluate the claims before settling them, and (2) as respondents indicate, such willful blindness is the norm.

B. Preservation. Respondents contend that the issue was not adequately preserved as "a federal constitutional issue." Opp. 9-11, 19-22. But our Petition at 7-9, 20-21 details the instances in which Prudential raised and preserved this federal constitutional challenge. Prudential challenged the constitutional adequacy of representation at the earliest possible opportunity and made as complete a record as the Pennsylvania courts would allow.

Within days of learning of the class settlement, Prudential petitioned the Pennsylvania court for relief. Its petition expressly noted that, since Prudential "was not a party" to the case, it had just "begun to investigate a rather lengthy record" and reserved the right "to supplement its Petition." Opp. App. 9a n.3. In its initial memorandum supporting the petition, Prudential explicitly invoked this Court's *federal constitutional decision* "in *Shutts*" for the proposition that "either inadequate notice *or inadequate representation* deprive a class action plaintiff of due process." Mem. in Support of Pet. 28 (Ct. Comm. Pleas 9/30/96). It then articulated precisely the theory we urge here: "any class representation which did not at least *take into account*" the value of a lawsuit pending in another forum, prior to settling it, was inadequate. *Ibid.* But because, when Prudential promptly filed its petition, it lacked specific

information about *whether* class counsel *had* taken such lawsuits into account, it could only "reserve its argument concerning the issue of adequate representation" for subsequent briefing. *Ibid.* Prudential then reiterated its constitutional argument, specifically requesting "discovery" into specified facts bearing "on the issue of inadequacy of * * * representation," if the court declined to grant relief on other grounds. Prudential's Br. In Support of Pet. for Recons. & Clarif. 29 & n.10 (Ct. Comm. Pleas 12/10/96). Yet Prudential's request for relief, including its request for discovery, was denied. App. 51a.

Any uncertainty in the record was eliminated when class counsel candidly — and crucially — admitted that they had done nothing to ascertain the existence or value of Prudential's claims. Br. of Appellee-Trial Class Reps. at 1 n.1 (Super. Ct. 5/27/97). Since class counsel conceded that they had made no reasonable inquiry before settling 36,000 building-damage claims for $7.8 million (including their own fees), and since counsel were concededly unaware that one class member was pressing claims for $110 million, Prudential had an adequate — indeed, compelling — record for pressing the Fourteenth Amendment due process objection that it expressly raised in precisely those terms in both courts below.

The company respondents cite three Pennsylvania decisions more than 70 years old to support their argument that no facts not contained in the verified petition itself could be considered. Opp. 21. The modern cases, however, require the trial court to consider all papers, including briefs, in evaluating a petition to reopen. See, *e.g.*, *Liazis* v. *Kosta*, 421 Pa. Super. 502, 507-508, 618 A.2d 450, 453 (1992) (briefs and record in other cases); *West Chester Plaza Assoc.* v. *Chester Eng'rs*, 319 Pa. Super. 196, 201-203, 465 A.2d 1297, 1299-1300 (1983) (supplemental brief). Indeed, the trial judge addressed this issue on the merits (but rejected Prudential's objection) without suggesting it was untimely or improperly framed. Pet. App. 54a-55a.

Thus, there can be little debate that the adequacy-of-class-counsel issue was raised in the Pennsylvania courts with "'fair precision and in due time.'" *Adams* v. *Robertson*, 520 U.S. 83, 88 (1997) (citation omitted). There is, therefore, no adequate state ground blocking review. Pet. 20-21.

CONCLUSION

The petition for a writ of certiorari should by granted.

Respectfully submitted.

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